Agenda Item#3



STATE OF MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES 135 STATE HOUSE STATION AUGUSTA, MAINE 04333-0135

To:

Commissioners

From: Jonathan Wayne, Executive Director

Date:

February 8, 2011

Re:

Request for Investigation by Thomas Valleau

On January 3, 2011, Thomas Valleau requested that the Ethics Commission investigate whether the Portland Press Herald newspaper was required in late 2010 to register and file campaign finance reports as a ballot question committee with the Portland City Clerk. During the week leading up to the November 2, 2010 election, the Press Herald allowed the Portland Regional Chamber of Commerce to run a number of full-page advertisements, which the Regional Chamber used to support a referendum in Portland to move to an elected-mayor form of City government.

Mr. Valleau contends that the newspaper's provision of advertising space constituted an "expenditure" by the Press Herald of more than \$5,000 for the purpose of promoting a ballot question, and, thus, the Press Herald was required to register and report with the City Clerk. Because the paper did not register and report, he argues that "[t]he public did not have any way to know of the significant role that the newspaper chose to play in this important election."

APPLICABLE LAW

Ballot Question Committees

PHONE: (207) 287-4179

Under Maine's campaign finance law, an organization that is not a political action committee and that "makes expenditures ... aggregating in excess of \$5,000 for the purpose of ... promoting ... a [ballot question] campaign" is required to register and file campaign finance reports as a ballot question committee (21-A M.R.S.A. § 1056-B,

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attached). If the expenditures promote a municipal referendum, the registration and reports must be filed with the clerk of the town or city. (<u>Id.</u>)

In 2000, the Maine Legislature created the ballot question committee reporting requirement in § 1056-B as an alternative to political action committee reporting. The enactment of § 1056-B was prompted by a federal district court decision, which had found the political action committee (PAC) definition overly broad. The ballot question committee reporting requirement thus covers organizations which are significantly involved in promoting or opposing a ballot question, but which do not qualify as a PAC because the major purpose of the organization is not influencing elections.

\$5,000 Threshold for Spending

When organizations are formed to conduct a political campaign to support or oppose a ballot question, they typically are required to form a PAC. It is common for PACs to invite other organizations to donate money to the PAC or to pay for goods or services that benefit the PAC's political campaign. Under § 1056-B, if an organization makes an expenditure through a contribution to a PAC, the expenditure does not count toward the \$5,000 spending threshold for determining whether the organization qualifies as a ballot question committee. The rationale for the exemption is that donor organizations are disclosed to the public as cash or in-kind contributors in the recipient PAC's campaign finance report.

Definition of Expenditure

The definition of expenditure includes a "payment, ... advance, ... or gift of money or anything of value, made ... for the initiation, support or defeat of a campaign, referendum or initiative" ((21-A M.R.S.A. § 1052(4)(A)(1), attached) While most people think of campaign expenditures as involving a payment of money, when an organization gives away something of value other than cash, the gift may qualify as an expenditure.

¹ This exemption is important to Mr. Valleau's request. He argues that the Press Herald made an "expenditure" and that, although the expenditure was a contribution to the Regional Chamber, that organization is not a PAC. Therefore, Mr. Valleau contends, the expenditure by the Press Herald should count toward the threshold for ballot question committee status.

The definition of expenditure contains an exception for "[a]ny news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless these facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family" (21-A M.R.S.A. § 1052(4)(B)(1))

Legal Duties of Ballot Question Committees

The legal duties for ballot question committees and PACs are similar. Any organization that qualifies as a ballot question committee is required to register with the Commission within seven days of exceeding the \$5,000 threshold. (21-A M.R.S.A. § 1056-B) The ballot question committee must file campaign finance reports at particular deadlines (similar to PACs), including at the time that they register, 11 days before the election, 42 days after the election, and on four quarterly deadlines. (21-A M.R.S.A. §§ 1056-B(1) & 1059) The organization may stop reporting once it is no longer engaged in campaign-related activity and files a termination report. (21-A M.R.S.A. §§ 1056-B(1) & 1061) The reports contain all contributions received and all expenditures made during the time period covered by the report. (21-A M.R.S.A. § 1056-B) The ballot question committee must identify a treasurer and keep certain records of contributions and expenditures for four years. (21-A M.R.S.A. § 1056-B(4))

Contributions Received in the last 13 Days before an Election

The final campaign finance report required for PACs and ballot question committees is due on the 11th day before an election, and covers all activity through the 14th day before the election. During the last 13 days before the election, PACs and ballot question committees must report large expenditures that they make. They must file a "24-Hour Report" within one day of making any single expenditure of \$500 or more.

Under current law, PACs and ballot question committees are <u>not</u> required to file 24-hour reports of large contributions they receive in the last 13 days. This was formerly required under the Election Law, but it was eliminated from the disclosure requirements by the Legislature in the last seven years. In 2010, the Commission proposed legislation

to reinstate the 24-hour reporting of large contributions during the last 13 days, but the Legislature declined to reinstate the requirement. (L.D. 1546, 124th Legislature).

FACTUAL BACKGROUND

Portland Referendum on Mayoral Election

On November 2, 2010, voters in the City of Portland considered a referendum on whether the mayor should be elected directly by City voters for a four-year term. Historically, the Portland City Council had elected one of its own members to serve as mayor for one-year terms. One PAC was formed to support the referendum: Elect Our Mayor. Another PAC, entitled Citizens to Retain Responsible Government, organized to oppose the referendum. The PACs were required to file campaign finance reports at regular deadlines, including on October 22, 2010 (11 days before the election) and December 14, 2010 (42 days after the election). A summary of the financial reporting by these two PACs is shown on this chart:

	Cash	In-Kind	
	Contributions	Contributions	Expenditures
Elect Our Mayor (supported referendum)			
August 18, 2010 (time of registration)	0.00	774.00	0.00
October 12, 2010 (October quarterly)	10,085.00	1,899.22	7,577.48
October 22, 2010 (11-day pre-election)	8,350.00	4,150.64	6,494.42
December 14, 2010 (42-day post-election)	6,335.00	50,483.50	12,930.22
Total	24,770.00	57,307.36	27,002.12
Citizens to Retain Responsible Government (opposed referendum)			
October 11, 2010 (time of registration)	1,225.00	0.00	399.00
October 22, 2010 (11-day pre-election)	50.00	108.94	0.00
December 14, 2010 (42-day post-election)	100.00	5,986.33	976.00
Total	1,375.00	6,095.27	1,375.00

During the last eight days before the election, the Portland Press Herald provided the Portland Regional Chamber of Commerce (referred to below as the "Regional Chamber") with a number of full pages of advertising space for it to use to support the referendum. In his request for an investigation, Tom Valleau describes the advertising as

eight full-page ads, which began appearing on Monday, October 25 and ended on Election Day. In its submission to the Commission (discussed in more detail below), the Press Herald states that it gave the Regional Chamber access to six full pages of advertising space within the period of Tuesday, October 26 to Tuesday, November 2.² The Press Herald provided a copy of each of the six advertisements. The decision to provide advertising space was apparently made by a single manager, Richard Connor, the publisher of the paper. The last three advertisements contain a few quotations from Portland businesses and residents supporting the referendum, including an excerpt from a Press Herald editorial supporting the referendum which was originally published in the paper on October 18, 2010.

The Press Herald and the Regional Chamber explain that the newspaper had no input on the content of the ads. Rather, the Regional Chamber cooperated with the Elect Our Mayor PAC on the images and language for the advertisements.

The treasurer for the Elect Our Mayor PAC, Kimberly Cook, was aware that it needed to report the advertising space it had received as an in-kind contribution. Prior to the December 14, 2010 reporting deadline, Ms. Cook called our office and spoke to PAC/Party/Lobbyist Registrar Cindy Sullivan. She explained that the Regional Chamber had received free advertising space from the Press Herald, and that the Regional Chamber worked with the PAC to create advertisements to support the referendum. Ms. Cook asked Ms. Sullivan for her advice on which entity should be listed as the contributor in the campaign finance report.

Cindy Sullivan advised that, since the PAC had no direct contacts with the newspaper concerning the advertising, the PAC should report the Regional Chamber as the contributor to the PAC. For purposes of disclosure to the public, Ms. Sullivan told Ms. Cook that she could include a notation in the report that the Press Herald had provided the advertising space at no charge.

In the December 14, 2010 report (the relevant page is attached), the Elect Our Mayor PAC disclosed that it received an in-kind contribution from the Regional Chamber in the amount of \$46,507.74 with the description of "advertising in the Portland Press

² The Press Herald provided six advertisements dated Tuesday, October 26; Wednesday, October 27; Friday, October 29; Saturday, October 20; Monday, November 1; and Tuesday, November 2. Apparently, the Press Herald did not provide space on October 28 and 31.

Herald." The PAC included a notation: "The Portland Press Herald did <u>not</u> charge the Portland Regional Chamber for the ad space."

Information from Portland Regional Chamber of Commerce

In response to a request by the Commission staff, the Regional Chamber provided information to the Commission through a February 2, 2011 letter from the Chamber's Chief Executive Officer, Godfrey Wood. Mr. Wood also consented to answer some questions in a short telephone interview conducted on February 4, 2011. The Portland Regional Chamber of Commerce is an association of five community chambers of commerce in the areas of South Portland/Cape Elizabeth; Scarborough; Portland; Falmouth/Cumberland; and Westbrook. Each organization has its own board of directors and separate accounting of funds.

According to Mr. Wood, the Portland Community Chamber has "long advocated for an elected mayor." Chris Hall, a paid consultant to the Portland Chamber of Commerce, was on the steering committee of the Elect Our Mayor PAC. In addition, James Cohen, Vice-Chair of the Portland Regional Chamber, was also on the steering committee.

Mr. Wood explains that a member of the board of the Portland Community
Chamber of Commerce approached Richard Connor at an event. (Wood letter, at 1) She asked if they could discuss support for the elected mayor campaign, including ad space.
Mr. Connor said yes. Several days later, an employee of the newspaper called Mr. Wood "offering to give the Chamber additional ads." Mr. Wood explains that the Regional Chamber and the Elect Our Mayor PAC decided on the content of the advertisements.

The paper had no input over the content of the advertising.

Information and Argument Provided by Portland Press Herald

Through a January 21, 2011 letter (attached), I invited the Press Herald to respond to Mr. Valleau's request for an investigation. The Press Herald submitted a factual response (referred to below as the "MTM response"),³ and a letter from legal counsel, Jonathan S. Piper of Preti Flaherty Beliveau & Pachios LLP ("Piper letter"). The full submissions are attached for your consideration, and this memo will highlight a few of the points with some comments on behalf of the Commission staff.

In the Press Herald's response, the newspaper states that it has donated ad space to "hundreds of nonprofits" since MaineToday Media purchased the paper from Blethen Maine Newspapers, Inc. (MTM response, at 1) MTM estimates that the donated ad space is worth more than \$750,000. The Press Herald lists roughly ten examples of nonprofit organizations that have received free ad space. The non-profit organizations may use the space to advertise their services, solicit donations, or publicize events. The donated ads increase public awareness and debate, and support the activities of various non-profits because of their valuable contribution to society.

With respect to the advertising space supplied to the Regional Chamber, the Press Herald states that the space was "not a donation," and instead was an "exchange of value for value." (MTM response, at 1 and 2) The newspaper explains that during 2010 it had an in-kind arrangement with the Regional Chamber. Under the arrangement, the Chamber would receive weekly free advertisements in exchange for providing a discount on the \$25,000 cost for MTM to be a "major sponsor." (MTM response, at 1) The Press Herald views the ad space supplied to the Chamber for the referendum as part of that agreement. (MTM response, at 3) That contention is discussed below.

The Press Herald maintains that its purpose in providing the ad space was <u>not</u> to promote the referendum, but to "further the arrangement with the Chamber" and to permit the Regional Chamber to express its political views on a policy issue and to provide a forum for political expression. (MTM response, at 3)

The Press Herald notes that "The Chamber decided on the content, layout and other features and political position of the advertisements. MTM neither reviewed it for layout, content, language, or for any other factor." (MTM response at 2) The Press

³ The abbreviation MTM stands for MaineToday Media, Inc. which owns the Portland Press Herald.

Herald states that it did not communicate with the Elect Our Mayor PAC directly about the ad space or the content of the advertisements. (<u>Id.</u>)

The Press Herald responds that it did publish its own editorial in support of the referendum. It notes that it published "numerous letters and guest editorials in opposition." (MTM response, at 2) (Tom Valleau told me that he remembers only one guest editorial in opposition to the referendum, by City Councilor Cheryl Leeman.)

The Press Herald concedes that the "MTM manager [who authorized the ad space] did know that the Chamber wanted additional ad space to take a position on the referendum, and that the Chamber supported an elected mayor." The newspaper states, however, that "the Chamber's position was irrelevant The paper would have allowed the additional ad space and run the ads even if the chamber opposed MTM's general editorial position. ..." (MTM response, at 3)

These same contentions are included in the letter from attorney Jonathan Piper. In addition, the newspaper's counsel makes the constitutional argument that any material published in the paper must be exempt from Maine's political reporting requirements. (Piper letter, at 1) Requiring the newspaper to meet campaign finance reporting requirements "threatens to chill and burden the ability of Maine's newspapers not only to participate in debate on public issues themselves, but to provide an opportunity for others to do so." (Piper letter, at 5)

Preliminary Response by Commission Staff

The Commission staff appreciates the newspaper's cooperation in providing a thorough response. Overall, we find the response to be credible. Nevertheless, we do feel obliged to point out that a few of the explanations and contentions by the Press Herald seem strained and should not be accepted by the Commission uncritically.

Difficulties of Valuation

First, the Press Herald appears to overstate the difficulty of placing a value on the six days of full-page advertisements that it provided to the Regional Chamber. (MTM response, at 1-2) In fact, on November 15, 2010, the marketing manager of the Press Herald calculated the fair market value of the full-page advertisements (\$46,507.74) and

supplied that figure to the Regional Chamber, which had requested it. The Chamber forwarded the fair market value of \$46,507.74 to the Elect Our Mayor PAC, so that the PAC could report the advertising as an in-kind contribution in its post-election report. The Commission staff does not believe that economists or other highly specialized experts were necessary to arrive at the valuation.

Exchange of Value for Value

Second, the Press Herald and its counsel state a few times that the six pages of advertisements were "an exchange of value for value," and "not a donation" to the Regional Chamber. (MTM response at 1 and 2, Piper letter, at 2) In spite of the explanation offered by the newspaper, the Commission staff continues to believe that the term "gift" or "donation" is a straightforward, accurate way to describe the transaction.

In the February 4 interview, Mr. Wood stated that in 2009 the Press Herald paid \$25,000 to the Chamber for "major sponsor status." At some point in 2010, the Press Herald and the Regional Chamber arrived at a different arrangement for the coming year. The paper agreed to provide the Regional Chamber with one advertisement per week (usually around one quarter page of space). In exchange for this weekly advertisement, the Chamber agreed to provide the Press Herald with a discount on the \$25,000 cost of major sponsor status for 2010. The amount of the discount was not made clear. When asked, Mr. Wood was unsure of the exact date when the weekly ads commenced, but his best guess without referring to records was that the weekly ads may have started in September 2010.

Some weeks or months later (during October 2010), a board member of the Community Chamber asked Richard Connor at an event if they could discuss support for the elected mayor campaign, perhaps including ad space. (Wood letter, at 1) According to Mr. Wood's letter, Mr. Connor said at the event that additional space would be provided to the Chamber. Several days later, an employee of the Press Herald contacted Mr. Wood, "offering to give the Chamber additional ads." (Id.)

I asked Mr. Wood the following question: when the Press Herald agreed to provide the Chamber with advertising space in support of the referendum campaign, <u>did</u> that agreement alter any of the terms of the previous <u>agreement concerning major sponsor</u>

status in 2010. He replied "no." It continues to be unclear to me why the Press Herald's provision of the six full-page advertisements qualifies as "an exchange of value for value," when it appears that the Press Herald did not receive any additional discount or other benefit for the ad space related to the referendum. I acknowledge that the Press Herald may have further relevant information to provide concerning this point. Based on the preliminary facts gathered to date, however, my personal view is that one could fairly describe the Press Herald as having provided a "gift" or "donation" to the Regional Chamber. In this memo, I will continue to describe the transaction as a gift or donation, with the understanding that the newspaper disputes that characterization.

Furthermore, providing the ad space for the referendum also seems more like a gift than an "exchange of value for value" when one considers that the fair market value of the advertising was \$46,507.74. The Press Herald describes the purported "exchange" as

[I]n exchange for running ads for the Chamber at any time, including those attached, MTM received a substantial discount from the \$25,000 MTM paid to the Chamber in prior years to be afforded "major sponsor" status. The ads for the Chamber, including the ones in question, therefore, were an exchange of value for value, not a donation.

How can something worth \$46,507.74 be given "in exchange for" a discount from \$25,000? It seems more likely that the newspaper's purpose in providing the advertising was donative (e.g., assisting the Chamber in promoting its message; or promoting the referendum) rather than in entering into an exchange for value.

Constitutional Argument: Freedom of the Press

Finally, the Press Herald argues broadly that it is exempt from campaign finance regulation because of its press function in encouraging political expression. The Commission staff agrees that the following activities by a newspaper are – and should be – exempt from campaign finance disclosure laws: news reporting, editorializing, and publishing letters to the editor and guest editorials on the opinion pages.

⁴ Gift is defined by the Merriam Webster Dictionary as "something voluntarily transferred by one person to another without compensation."

Providing free advertising to one side of an electoral campaign, however, is different. Giving away free advertising to a candidate or advocate for a referendum is not a traditional function of the press – at least not since the inception of modern campaign finance laws in the 1970's. Advertising space is a commodity for which political groups pay money, sometimes in considerable sums.

The Press Herald argues that the Commission should view advertising space donated to another entity for it to use for electoral advocacy in the same way as news reporting and editorializing. The newspaper asserts that "State agencies cannot, under the First Amendment, require newspapers to register and report for content that appears in the four corners of their newspaper." (Piper letter, at 2) and "Any application of the statute that could possibly chill the use of a newspaper as a medium of political expression is forbidden by the Constitutions of both the United States and Maine." (Piper letter, at 2)

The newspaper's counsel does not cite any supporting legal authority, however, and the preliminary view of the Commission staff and counsel is that the Press Herald's constitutional arguments are too broadly stated to be supported by case law interpreting the First Amendment of the U.S. Constitution.

Maine campaign finance law already contains an exemption for traditional press activities such as news reporting, editorials or commentaries, which is consistent with constitutional requirements.⁵ At its October 20, 2010 meeting, the Commission relied upon this exception to dismiss a complaint against the Press Herald by a private citizen, Walter Eno. Mr. Eno alleged that Press Herald columnist Bill Nemitz had violated Election Law by expressly advocating against candidate Paul LePage.

⁵ The definition of "expenditure" in Maine campaign finance law contains an exception for "[a]ny news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless these facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family ..." (21-A M.R.S.A. § 1052(4)(B)(1))

STAFF RECOMMENDATION

Outside the Commission's Jurisdiction: Media Ethics

This matter raises interesting issues of media ethics, including whether the Press Herald's donation of valuable advertising space to <u>one side</u> of an election campaign is consistent with news consumers' expectations of a traditional news outlet. This issue, however, is outside the jurisdiction of the Commission, which administers Maine's political disclosure laws. Mr. Valleau has succeeded in bringing the newspaper's activities to the attention of the press, the political blogs, and ultimately the public. Through his efforts, the Press Herald's activities are open for debate and scrutiny.

Discretion by the Commission

For your consideration, we repeat our view that the members of the Commission have prosecutorial discretion whether or not to pursue investigations requested by the public. In response to a request for investigation, made pursuant to 21-A M.R.S.A. § 1003(2), the Commission is required to investigate only "if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred." In this matter, the staff has engaged in a significant preliminary investigation, consistent with your regulations, and we believe a general understanding of the facts has been developed. For the reasons articulated below, we recommend conducting no further investigation of this matter.

Reasons not to Take Action

The Commission staff recommends that the Commission conduct no further investigation regarding this matter, for the following reasons.

(1) Unclear Purpose

In order to find the Press Herald in violation for not registering and reporting as a ballot question committee, the Commission would need to conclude that the newspaper's purpose in providing the advertising space to the Chamber was to support the referendum. Purpose is a necessary element under two related sections of the statute:

- in order to be considered an "expenditure," the paper's donation of the advertising must have been made for the purpose of supporting the Portland referendum (21-A M.R.S.A. § 1052(4)(A)(1)); and
- to count toward the \$5,000 threshold for BQC reporting, the expenditure must have been <u>made for the purpose of promoting</u> the referendum campaign. (21-A M.R.S.A. § 1056-B).

The staff acknowledges that there are some facts present that could point in the direction that the paper's purpose in providing the advertising to the Chamber was to promote a "yes" vote on the referendum.⁶ On the other hand, the Press Herald did not have any input on the content of the advertisement, which makes its purpose more difficult to determine.

In addition, the Commission staff believes that the Press Herald has identified an equally plausible alternative purpose: assisting a business partner (the Regional Chamber) in expressing to the public its view on an important matter of public policy. The newspaper provided the ads because the Chamber requested them. That was the factual context for the gift. The Press Herald does have a track record of providing free advertising space requested by non-profit organizations for various purposes. (The Press Herald and the Regional Chamber, in particular, have a cooperative relationship. Richard Connor is a member of the board of directors of the Portland Community Chamber. The Press Herald is listed as one of three "Special Community Partners" at the top of the Regional Chamber's home page.)

Given this other valid purpose, the staff questions whether there is sufficient evidence under the circumstances for the Commission to find that a violation of the ballot question committee law has occurred.

⁶ These facts include: (1) At the time that he authorized the donation, the newspaper's publisher knew that the advertising would be used by the Regional Chamber in support of the referendum; and (2) The paper gave six <u>full-page</u> ads, on six days in close succession, leading up to a referendum by Portland voters. This is a large gift, which could be consistent with a purpose by the newspaper to sway public opinion, not just to facilitate a business partner expressing a political point of view.

(2) Public was Informed of the Press Herald's Donations

In the campaign finance framework, the Commission staff believes that the Press Herald was effectively functioning as a contributor. It had a resource (advertising space) that it knew was of value to another organization (the Chamber). The Press Herald decided to donate the space in response to a request from the Chamber, knowing that it would be used for electoral purposes.

The Press Herald's donation of the advertising space to the Regional Chamber was publicly disclosed in a campaign finance report on December 14, 2010, in the post-election report filed by the Elect Our Mayor PAC. The PAC was the only entity registered with the Portland City Clerk for the purpose of supporting the referendum. Anyone wishing to research the financial resources used to support the referendum would probably review this report, which was posted on the Portland City Clerk's website.

In the December 14, 2010 report, the PAC disclosed that it received an in-kind contribution from the Regional Chamber in the amount of \$46,507.74 with the description of "advertising in the Portland Press Herald." The PAC included a notation: "The Portland Press Herald did <u>not</u> charge the Portland Regional Chamber for the ad space." In cooperation with the Regional Chamber, the PAC went out of its way to notify the public that the advertising came from the Press Herald at no charge. The information provided to the public was roughly the same as if the Regional Chamber was itself a PAC that was reporting its receipt of the contribution. The Commission staff believes this reporting sufficiently disclosed to the public the source of the donation of the ad space.

Mr. Valleau has raised the issue that the public did not receive any financial reporting before the election that the paper had provided the advertising space. We appreciate his concern. For better or worse, there are many contributions made to a PAC or ballot question committee in the last 13 days before an election that are not known by the public until the PAC or ballot question committee files its post-election report 42 days after the election. I have attached a chart of contributions exceeding \$25,000 received by PACs and ballot question committees during the last 13 days before a statewide ballot question in 2009 and 2010. The contributions were not reported publicly until 42 days after the election. The Commission staff hopes that the Legislature will revisit this issue

and require large contributions over a certain threshold (\$10,000? \$25,000) to be reported more promptly.

(3) BQC Reporting should not be a Trap for the Unwary

Campaign finance laws play an important role in shedding light on who is influencing elections, but some discretion is necessary to avoid turning the enforcement process into a trap for the unwary. To the extent that the Press Herald considered that there could be campaign finance repercussions to giving free ad space to the Chamber, it would have been reasonable for the paper to assume that others – the Chamber, or the Elect Our Mayor PAC – would be responsible for the campaign finance reporting.

Options for Your Consideration

For the February 17, 2011 meeting, the Commission staff recommends that you vote not to conduct any further investigation in this matter.

If, however, you believe there is a possible registration and reporting violation that should be pursued by the Commission, you could authorize the staff to conduct any further investigation necessary and to perform further research in response to the constitutional arguments presented by the newspaper.

21-A M.R.S.A. § 1056-B. BALLOT QUESTION COMMITTEES

A person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a campaign as defined by section 1052, subsection 1, must file reports with the commission in accordance with this section. For the purposes of this section, "campaign" does not include activities to promote or defeat or in any way influence the nomination or election of a candidate. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of influencing in any way a campaign. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee. Until July 31, 2011, in the case of a municipal election, the registration and reports must be filed with the clerk of that municipality. Beginning August 1, 2011, in the case of a municipal election, the registration and reports must be filed with the commission. [2009, c. 524, §8 (RPR).]

1. Filing requirements. A report required by this section must be filed with the commission according to the reporting schedule in section 1059. After completing all financial activity, the committee shall terminate its campaign finance reporting in the same manner provided in section 1061. The committee shall file each report required by this section through an electronic filing system developed by the commission unless granted a waiver under section 1059, subsection 5.

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[ 2009, c. 190, Pt. A, §20 (AMD) .]
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2. Content. A report must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of \$100 in any election; the date of each contribution; the date and purpose of each expenditure; the name and address of each contributor, payee or creditor; and the occupation and principal place of business, if any, for any person who has made contributions exceeding \$100 in the aggregate. The filer is required to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a campaign and only those expenditures made for those purposes. The definitions of "contribution" and "expenditure" in section 1052, subsections 3 and 4, respectively, apply to persons required to file ballot question reports.

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[ 2009, c. 524, §9 (AMD) .]
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- 2-A. Contributions. For the purposes of this section, "contribution" includes, but is not limited to:
 - A. Funds that the contributor specified were given in connection with a campaign; [2009, c. 524, §10 (AMD).]
 - B. Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a campaign; [2009, c. 524, §11 (AMD).]
 - C. Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a campaign when viewed in the context of the contribution and the recipient's activities regarding a campaign; and [2009, c. 524, §12 (AMD).]

D. Funds or transfers from the general treasury of an organization filing a ballot question report. [2007, c. 477, §4 (NEW).]

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[ 2009, c. 524, §10-12 (AMD) .]
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3. Forms. A report required by this section must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form.

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[ 1999, c. 729, §8 (NEW) .]
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- 4. Records. A person filing a report required by this section shall keep records as required by this subsection for 4 years following the election to which the records pertain.
 - A. The filer shall keep a detailed account of all contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a campaign and all expenditures made for those purposes. [2009, c. 524, §13 (AMD).]
 - B. The filer shall retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50. [2007, c. 477, §4 (NEW).]

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[ 2009, c. 524, §13 (AMD) .]
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21-A M.R.S.A. § 1052. DEFINITIONS

Expenditure. The term "expenditure:"

A. Includes:

- (1) A purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, made for the purpose of influencing the nomination or election of any person to political office; or for the initiation, support or defeat of a campaign, referendum or initiative, including the collection of signatures for a direct initiative, in this State;
- (2) A contract, promise or agreement, expressed or implied, whether or not legally enforceable, to make any expenditure for the purposes set forth in this paragraph; and
- (3) The transfer of funds by a political action committee to another candidate or political committee; and [2005, c. 575, §4 (AMD).]

B. Does not include:

(1) Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless these facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family;



CITY CLERK

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Website: www.maine.gov/ethics

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ZONO DEC 14 P 3: 28

2010 CAMPAIGN FINANCE REPORT

For Political Action Committees

Please complete ALL entrie	S.			
NAME OF COMMITTEE	Electore Mayor, yes	m1!		
STREET	POBUX 17851			CHECK IF
CITY AND ZIP CODE	Portland 04112	TELEPHONE NUMBER	2073321513	PREVIOUS REPORT
E-MAIL	jed@ Stonesthrm consu	Iting.c	n	
NAME OF TREASURER	Kimberly Cook	•		
MAILING ADDRESS STREET	70 Aiba St			CHECK IF
CITY AND ZIP CODE	Portland 04103	TELEPHONE NUMBER	2335785	PREVIOUS REPORT
E-MAIL	VIs cool @ mane 11- Co	· · · · · · · · · · · · · · · · · · ·		

Type of Report	Due Date	Dates of Report Period
☐ Initial	Date of Registration	January 1, 2010 date of registration
☐ April Quarterly	April 12, 2010	January 1, 2010 — March 31, 2010
☐ 11-Day Pre-Primary	May 28, 2010	April 1, 2010 — May 25, 2010
☐ 42-Day Post-Primary	July 20, 2010	May 26, 2010 — July 13, 2010
☐ October Quarterly	October 12, 2010	July 14, 2010 — September 30, 2010
☐ 11-Day Pre General	October 22, 2010	October 1, 2010 — October 19, 2010
☐ 42-Day Post-General	December 14, 2010	October 20, 2010 — December 7, 2010
☐ January Quarterly	January 18, 2011	December 8, 2010 — December 31, 2010
☐ Amendment to:		
unpaid debts or obliga	ations during the reporting period. Cl	butions and no expenditures and did not incur any neck the appropriate report above as well.
Termination Report: If	the committee will have no further a	ctivity. Check the appropriate report above as well.

I CERTIFY THAT I HAVE EXAMINED THIS REPORT AND TO THE BEST OF MY KNOWLEDGE IT IS TRUE, CORRECT, AND COMPLETE.

IN-KIND CONTRIBUTIONS

- In-kind contributions are goods and services (including facilities) that a committee received at no cost or at a cost less than the fair market value. They include all goods and services purchased for the committee by others if the committee does not expect to reimburse the person who made the purchase.
- For contributors who gave more than \$50, the committee must report the contributor's name, address, occupation, and employer.
- If employment information has been requested from the contributor and the contributor has not provided it, indicate "information requested" for the occupation and employer.
- For cash contributions totaling \$50 or less, please enter "uniternized contributions" as the contributor and the total amount and the appropriate key code on a line on this page. Once a contributor has given the committee more than \$50 in a report period, you must list that contributor separately.

DATE RECEIVED	CONTRIBUTOR'S NAME, ADDRESS, ZIP	OCCUPATION AND EMPLOYER	DESCRIPTION (of goods, services, facilities, or discounts received)	TYPE (use key code)	VALUE (eştimated fair market value)
10/21/0	Portland Color 14 Industrial Way Portland 04103		Signs	2	797.18
194/10	Roxanne Quinby 55 Carroll st Portlad 04102	Busirers	fundraism event		1,000.w
1112	Pertland Community Charles 60 Percel St 04101		strategic planning by foc consultant	2	. 1190
11/2	Portled Regional Charles 60 Read St 84(0)		design.	2	300
10/24-	Portland Regional Chalen to Pearl St 04101		advertising in lootland Prestands	2	46,507,74
	NOTE: The Portland change the	fress thraid Portland Pegur	did cat rd Charber for the	od	spece
11/2/10	legred your voters 142 Hyr St # 302 Pritional 04101		strategie planing		688.58

Total in-kind contributions (this page only) \Rightarrow (combined totals from all Schedule A-1 pages must be listed on Schedule F)

Key Codes:

1 = Individuals

2 = Commercial Source

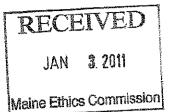
3 = Political Action Committees

4 = Party Committee

5 = Candidate Committees

6 = Unitemized Contributions of \$50 or less

THOMAS F. VALLEAU 65 ROCKLAND AVENUE PORTLAND, MAINE 04102



Jonathan Wayne, Executive Director Maine Ethics Commission 45 Memorial Circle Augusta, Maine O4330

December 30, 2010

Dear Mr. Wayne:

In November 2010, a referendum question appeared on the City of Portland municipal ballot asking voters if they favored changing their type of government from a council-manager structure to an elected mayor form. The question was approved by a vote of 12,963 to 11,825. As a result, voters in Maine's largest city will go to the polls next November to elect a mayor for the first time in 70 years.

Two groups organized around this issue. Citizens for Responsible Government opposed the measure. The other, a group calling itself Elect Our Mayor, campaigned for adoption.

The Portland Regional Chamber of Commerce and the Portland Press Herald were active as advocates for the ballot question on the grounds that a popularly elected mayor would provide better leadership for the city.

The Elect Our mayor group filed its final campaign finance report on December 14, 2010, listing total expenditures in excess of \$82,000.

As shown in this report, Elect Our Mayor, the Portland Regional Chamber of Commerce and the Portland Press Herald arranged to influence the campaign by working together in the following way:

The Portland Press Herald gifted advertising to the Portland Regional Chamber of Commerce, and in doing so it made an expenditure as defined in Maine's election laws. The Portland Regional Chamber is not a political action committee.

In all, the Portland Press Herald gifted eight full-page color advertisements to the Chamber in the closing days of the campaign. The Portland Press Herald has never given a gift of this size or type to the Chamber in the past.

The value of a full page, color advertisement in a weekday edition of the Portland Press Herald for an ordinary person is \$5,332.10. Eight such ads would have a value of \$42,656.80.

The ads began appearing on October 25 and ran until Election Day.

In light of these facts, the Portland Press Herald should have registered with the City of Portland as a ballot question committee as required by Maine's election laws but it did not do so, and the public did not have any way to know of the significant role that the newspaper chose to play in this important election.

Had the Portland Press Herald made the required disclosures, the public would have known the name of the treasurer, any other principal officers, and all decision makers behind the gifted advertising.

I request that the Commission investigate this matter.

Sincerely,

Thomas F. Valleau

tvalleau@maine.rr.com

207 774 3600



STATE OF MAINE COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES 135 STATE HOUSE STATION AUGUSTA, MAINE 04333-0135

January 21, 2011

Daniel W. Walker, Esq. Preti Flaherty Beliveau & Pachios LLP P.O. Box 1058 Augusta, Maine 04332-1058

Dear Mr. Walker:

Thank you for speaking to me concerning Thomas Valleau's request to investigate advertising provided by Maine Today Media, Inc. (referred to below as "MTM") to the Portland Regional Chamber of Commerce. In the request, Mr. Valleau alleges that MTM was required to register and file campaign finance reports with the Portland City Clerk as a ballot question committee in connection with the November 2, 2010 referendum in Portland on mayoral election.

Applicable Law

Under Maine's campaign finance law, an organization that has a major purpose other than influencing elections and that makes expenditures totaling more than \$5,000 to promote a referendum is required to register and file campaign finance reports as a ballot question committee (21-A M.R.S.A. § 1056-B, attached). If the expenditures relate to a municipal referendum, the registration and reports must be filed with the clerk of the town or city.

When organizations are formed to conduct a political campaign to support or oppose a ballot question, they typically are required to form a political action committee (a PAC). It is common for PACs to invite other organizations to donate money to the PAC or to pay for goods or services that benefit the PAC's political campaign. Under § 1056-B, if an organization makes an expenditure through a contribution to a PAC, the expenditure does not count toward the \$5,000 spending threshold for determining whether the organization qualifies as a ballot question committee. The rationale for the exemption is that donor organizations are disclosed to the public as cash or in-kind contributors in the recipient PAC's campaign finance report.

The definition of expenditure includes a "payment, ... advance, ... or gift of money or anything of value, made ... for the initiation, support or defeat of a campaign, referendum or initiative" ((21-A M.R.S.A. § 1052(4)(A)(1) attached) The definition of expenditure contains an exception for "[a]ny news story, commentary or editorial

OFFICE LOCATED AT: 45 MEMORIAL CIRCLE, AUGUSTA, MAINE WEBSITE: www.maine.gov/ethics

FAX: (207) 287-6775

Daniel W. Walker, Esq. January 21, 2011 Page 2

distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless these facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family ..." (21-A M.R.S.A. § 1052(4)(B)(1))

Commission's Consideration of this Matter

The members of the Commission will consider Mr. Valleau's request at their meeting on February 17, 2011 at 9:00 a.m. A representative of MTM should be present at the meeting to answer questions from the Commission or to make any presentation that MTM would like.

Request for Information

Please provide the following information no later than Tuesday, February 2, 2011. If MTM needs one or two more days, please let me know.

- Did MTM provide eight full-page advertisements to the Portland Regional or Community Chamber of Commerce (the Chamber) that ran between October 25 -November 2, 2010? Please provide three examples of the advertisements.
- 2. What was the total value of the advertising space? Did MTM charge the Chamber for the space?
- 3. Were there any direct communications between MTM and the Elect our Mayor political action committee (PAC) concerning the advertising space or the advertisements?
- 4. In the view of MTM, was it donating the advertising space to the Chamber, or to the Elect our Mayor PAC?
- 5. Which organization(s) decided on the content of the advertisements?
- 6. Did MTM publish an editorial in support of the referendum?
- 7. Did the MTM manager(s) who authorized the donation of the advertising space know that the Chamber would use the space to promote the referendum?
- 8. Is it fair to say that the purpose of MTM in providing the advertising space to the Chamber was to promote the referendum?
- 9. Was the advertising space provided by MTM part of MTM's "regular" in-kind advertising agreement with the Chamber, or separate from that agreement. The

Daniel W. Walker, Esq. January 21, 2011 Page 3

Commission staff does not want to intrude on the private arrangements of the two organizations, but please provide a general explanation so that we understand the context and purpose of the donated advertisments.

The Commission staff would be pleased to receive any other factual information that MTM believes is relevant.

In addition, please provide any legal argument concerning whether the Commission should determine that MTM qualified as a ballot question committee, such as the media exception, or constitutional or jurisdictional arguments.

Thank you for your cooperation with this request. Please call me at 287-4179 if you need any clarifications on the request or you wish to discuss the applicable law.

Sincerely,

Jonathan Wayne Executive Director

cc: Thomas Valleau

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FEB 03 2011

Maine Ethics Commission

Ionathan S. Piper ipiper@preti.com

February 2, 2011

Jonathan Wayne, Executive Director Maine Commission on Governmental Ethics and Election Practices 135 State House Station Augusta, ME 04333

> Complaint of Thomas Valleau against Portland Press Herald RE:

Dear Commissioner Wayne:

This letter constitutes the Portland Press Herald's response to the request for investigation filed by Mr. Valleau concerning ads run by the Greater Portland Chamber of Commerce (the space for which was requested by the Chamber from the Portland Press Herald) in connection with Portland's recent initiative on mayoral elections. In writing this lefter and answering the Commission's inquiries, we in no way waive any assertion that under the First Amendment the Commission lacks jurisdiction in this case to impose its rules and processes on the press. From top to bottom, Mr. Valleau's complaint is without merit, and threatens the operation of a free press.

First, it should be noted that whatever the validity of the Maine statutes in question, Mr. Valleau apparently found out about the alleged donation through the vehicle of that very same law. That is, the ads were reported by Elect our Mayor, Yes on 1 on its list as a donation by the Chamber of Commerce. Thus, whether Maine's Ballot Question Committee statute is constitutional or not, or whether it applies in any event to the Press Herald in light of the facts at hand, is beside the point. To the extent the Maine populace had an interest in knowing the genesis, financial and otherwise, remote or direct, of the ad, it had the opportunity to do so.

More importantly, however, the statute and its implementing regulations are unconstitutional on their face, and as applied, if the Commission rules that the facts bring the Press Herald within their ambit. State agencies cannot, under the First Amendment, require newspapers to register and report for content that appears in the four corners of their newspaper.

Any application of the statute that could possibly chill the use of a newspaper as a medium of political expression is forbidden by the Constitutions of both the United States and Maine. As the Supreme Court said recently "where the First Amendment is concerned, the tie goes to the speaker, not the censor." FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 474 2180943.4

Preti Flaherty Beliveau & Pachies LIP Attorneys at Law

Mailing address: P.O. Box 9546 | Portland, ME 04112-9546 | 1th 207.791.3000 | FAX 207.791.3111 | One City Center | Portland, ME 04101

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Jonathan Wayne, Executive Director February 2, 2011 Page 2

(2007), quoted in NORM v. McKee, 723 F. Supp.2d 245, 261 (D.Me. 2010) (applied by Judge Hornby to a challenge to Maine's reporting and registration requirements). The Portland Press Herald is, without question, a newspaper. It is entitled to the full protections of both the Maine and federal Constitutions.

Under the terms of the statute itself, however, this law does not apply to the actions complained of by Mr. Valleau.

The Press Herald provides space to competing points of view in its letters columns, its editorials, guest editorials, and on its OpEd pages such as Maine Voices. It did so with respect to the mayoral campaign in Portland, as it does with many other issues.

In addition, the Press Herald has long had a policy of permitting numerous public interest, non-profit, organizations free advertising space to run whatever ads they deem appropriate, either on political issues or direct or indirect political advocacy, at their discretion. The Press Herald frequently agrees to supply a certain amount of free ads to non-profits over the course of a year. Also, ad hoc requests, both formal and informal, are common and the Press Herald receives and grants many such requests annually. The Press Herald also receives numerous requests for additional ad space from non-profits that have used up their allotted space for the year. Such requests are usually granted, so there really is no hard and fast "allotment."

The Press Herald has donated space to hundreds of non-profits, including Spurwink. The United Way, Riverton and Kennedy Study Centers, the Red Cross, the Salvation Army, the Portland Museum of Art and Maine Records. Organizations that have received additional space on request include Riverton and Kennedy Study Center, the Red Cross (when emergency blood supply issues arise), sports teams such as the Red Claws and Portland Pirates and many charities if their fundraising is running below goals.

The case of the Chamber ads, including those on the mayoral campaign, however, is somewhat different. Prior to 2010, the Press Herald paid \$25,000 per year to the Chamber for "major sponsor" status. In 2010, however, the Press Herald received a substantial discount from the \$25,000 payment in exchange for supplying substantial ad space to the Chamber. The Press Herald ran at least one ad per week for the Chamber. In the case of the mayoral ads, the Chamber requested and the Portland Press Herald provided, without prior examination or any attempt to influence their content, ad space as requested by the Chamber. Thus, it is not accurate to call the mayoral ads a donation of ad space at all. Rather, it was part of an exchange of value for value.

The Press Herald does not dictate or censor the content of advertisements of the Chamber or any other non-profit. Ad space such as the mayoral ads at issue here are something that only a newspaper or other media outlet can provide. It is part of a continuum of public political reporting and expression that is unique to media companies, and particularly to newspapers. It is

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Jonathan Wayne, Executive Director February 2, 2011 Page 3

at the core of America's marketplace of ideas and opinion. Indeed, the existence of such a forum broadens the right to speak of ordinary citizens.

The Portland Press Herald not only expresses its own editorial opinions, and the sometimes divergent opinions of its columnists. It also makes space available to outsiders in its daily letters page as well as in opinion pieces and guest editorials. As to the mayoral issue, all points of view were presented in the paper. The ad space in this context, even if it had been a straight "donation," must be considered as part of a forum for political expression. The ad space, even if considered a "donation," is not comparable to a cash donation to a political group or an in-kind donation of staff to do legwork for a committee, which is the type of in-kind donation addressed by Maine's statute and regulations. The "donation" here provides a voice to members of the public via a newspaper. It is not hyperbole to state that the application of even the reporting and disslosure requirements that Mr. Valleau says apply in this circumstance to a newspaper would chill this valuable, constitutional resource.

What exactly is being alleged? Mr. Valleau claims that the newspaper, by virtue of providing ad space to the Chamber, became a Ballot Question Committee pursuant to 21-A M.R.S.A, § 1056-B, and thus was required to report an "expenditure" to the Commission. An examination of § 1056-B is therefore in order. Section 1056-B states that

any person who is <u>not</u> defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a campaign as defined by Section 1952, subsection 1, must file reports with the Commission.... (emphasis added).

For purposes of § 1056-B, the word "campaign" includes "any county or municipal referendum." The Portland Press Herald is not accused of having received any contributions, therefore it must be being accused of "making expenditures, other than by contribution to a political action committee...." See § 1056-B. The Chamber itself is not a political action committee, so if the Chamber ad space were an "expenditure" under the statute, and were made with the requisite intent, the statute could apply.

"Expenditures" under § 1052, the general definition section, are those made "for the initiation, support or defeat of a campaign referendum or initiative..." See § 1052(4)(A). The general definition of expenditure in § 1052, however, does not apply across the board to § 1056-B. Rather, if it applies at all, it is conditioned by the limitation placed by § 1056-B on the definition of "expenditures" that qualify (if the threshold of \$5,000 is reached): such an expenditure must be made "for the purpose of initiating, promoting, defeating or influencing in

¹Was the Press Herald also therefore required to report the extensive space given to the opposite side in its letters section? These were also "donated" space, and are not mentioned in the exception at § 1052(4)(B)(1). Is the Press Herald required to report to the Commission every time it routinely donates space to one or more of hundreds of non-profits, in the event such non-profits touch on a ballot initiative question in the copy they furnish to the paper? 2180943.4

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Jonathan Wayne, Executive Director February 2, 2011 Page 4

any way a campaign as defined by § 1052, subsection 1 . . . " (emphasis added) here, a ballot question.

Under the present facts, this definition of "purpose" cannot constitutionally or even reasonably be applied to the ad space given to the Chamber, an activity that is and has been ongoing without regard to any election, ballot initiative, or any other electoral activity. The "purpose," in other words, of the Press Herald's running of the ads for the Chamber was not for any of the defined categories in § 1056-B, but rather its general support to a broad variety of non-profits and its specific support for and arrangement with the Chamber. Further, the arrangement (ad space for a reduction in dues) with the Chamber removed the running of the ad space from the realm of "donations" in any event, and thus from the scope of "expenditure" under § 1056-B.

Even though the Press Herald's editorial position (but not the content of all its editorials by columnists, OpEds and guest pieces) happened in this instance to coincide more or less with the Chamber's, it cannot be said that the purpose of running the ads—even if considered a donation—was for initiating, promoting, or defeating the campaign. That may indeed have been the Chamber's purpose, but it is not proper or constitutional to impute the Chamber's purpose to the Press Herald simply because it was willing to provide a forum for the Chamber. No more so than to impute a contrary purpose to the Press Herald when it, in fact, provided space (for which if did not charge) to opposing views in the letters column or to guest opinion writers who opposed an elected mayor. Many points of view appeared in the paper at no charge.

Section 1056-B's use of the word "influence" and the phrase "influencing in any way" is particularly problematic here. As the broadest possible category in § 1056-B, it might be deemed to apply to the Press Herald's behavior since "influencing in any way" is a limitless, all encompassing phrase, a paragon of vagueness and over breadth. However, that very use of the word "influence" and the phrase "influencing in any way" has been held to be unconstitutionally vague in a directly analogous ruling by Judge Hornby in National Organization for Marriage (NORM) v. McKee, 723 F.Supp.2d 245 (D.Me. 2010) (holding the use of the word "influence" and the phrase "influencing in any way" to be unconstitutionally vague with respect to §§ 1052(5), 1012(3), 1053-B, 1019-B(2) and 1014(2-A)).

Further, the issue of the valuation of in-kind expenditures is not addressed by the statute. The reference to "paid staff time" in § 1056-B suggests that valuation should be considered

²Although in National Organization for Marriage v. McKee, 666 F. Supp.2d 193 (D.Mc. 2009) Judge Homby found the word "influence" in the context of a challenge to the ballot question committee statute to be "sufficiently clear," see NORM v. McKee, 723 F. Supp.2d at 261 n. 108, the context of the earlier case was quite different and there is little question that Judge Homby would find the use of the word "influence" and the phrase "influencing in any way" in the instant context to be unconstitutionally vague, and thus menforceable.

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Jonathan Wayne, Executive Director February 2, 2011 Page 5

direct cost to the entity making the expenditure, 3 not some determination of market value, if one could in any event determine the "market value" of donated or bartered ad space. Here, the market value of even donated ad space is technically zero, because the recipient of the ad space could not have sold it to someone else, and the Press Herald did not turn away paying ad customers. Similarly, bartered space does not have a market value because this exchange was unique to the two parties that engaged in it. There is no market value in the sense of an expenditure if, as occurred here, the ad space was exchanged for value from the Chamber in the form of a reduction in the paper's sponsorship fee.

In any event, the difficulty of determining even how to value such a donation raises constitutional problems. In-kind donations such as staff time, piles of plywood for signs, etc., are easily valued. But having to retain experts or economists to determine how to value an intangible such as donated ad space (so a newspaper would know whether it had to report the donation) adds to the pre-speech burden on the newspaper. In the recent Citizens United case, see Citizens United v. Federal Election Committee, ____U.S. _____, 130 S.Ct. 876 (2010), the Supreme Court cautioned that at some point the complexity of election advocacy regulation would reach constitutional dimensions by placing an intolerable burden on speech, a caution reiterated by Judge Hornby in his recent decision on Maine's laws on campaign finances and reports, see NORM v. McKee, 723 F.Supp 2d at 263 n.132. If newspapers, when donating ad space, must hire lawyers and economists to determine whether donating such an ad triggers reporting requirements, it is quite likely that such a forum will become less and less available. Such a burden on speech by the press is most probably unconstitutional.

Finally, because § 1056-B can only be applied to the Press Herald's actions challenged here pursuant to First Amendment case law if it meets the "exacting scrutiny standard," which requires a substantial relationship between disclosure requirements and a sufficiently important governmental interest, the fact that the very information that Mr. Valleau believes the statute requires to be disclosed by the paper was in fact disclosed by Elect our Mayor indicates that there is no important governmental interest at stake. See NORM v. McKee, 723 F. Supp.2d at 262. Not even Mr. Valleau is claiming that the Press Herald had an obligation to disclose a donation, much less a bartering, of ad space on the ads themselves, and there is no particular public interest in multiple disclosures of the same information.

For the foregoing reasons, Mr. Valleau's complaint is without merit, and, whatever its intent, threatens to chill and burden the ability of Maine's newspapers not only to participate in debate on public issues themselves, but to provide an opportunity for others to do so. The Press

Indeed, it would be very difficult to determine the actual cost to the Press Herald of running the challenged ads. Such information is proprietary in any event, and, if required by the Commission, should be sealed. Certainly, the Press Herald did not runn away any paying business to run the ad, so there was no opportunity cost, nor were Press Herald resources utilized to create the copy. The marginal cost to set up and print the ads, even including paper, did not reach the \$5,000 threshold even in aggregate.

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Jonathan Wayne, Executive Director February 2, 2011 Page 6

Herald, in the noblest tradition of the American press, has many avenues for performing this function, and the State has no right or ability to burden or chill this activity.

Jonathan S. Piper Michael Kaplan Daniel W. Walker

Counsel to MaineToday Media

MK/nr

FEB 03 2011

Maine Ethics Commission

RESPONSE OF MAINETODAY MEDIA, INC. ("MTM") TO COMMISSION'S REQUEST FOR INFORMATION

NOTE: In answering the Commission's inquiries, MTM in no way waives any right to challenge the Commission's jurisdiction to impose its rules and processes on the press, or the constitutionality of the statute, regulations or proceedings.

1. Did MTM provide eight full-page advertisements to the Portland Regional or Community Chamber of Commerce (the Chamber) that ran between October 25 – November 2, 2010? Please provide three examples of the advertisements.

RESPONSE:

First, there is no applicable statute or regulation that uses the word "provide," which is ambiguous in this context, so this response will simply describe the factual background.

MTM has donated more than \$750,000 worth of ad space to non-profits every year since the purchase of the Portland Press Herald (and other media properties) from Blethen. Some amount of donated ad space is readily supplied to numerous non-profits. However, non-profits often exceed the anticipated amount, and have seldom – if ever – been turned down when they requested additional space. In practice, many non-profits simply ask for space on an ad hoc basis without any formal prearrangement, and the space nonetheless is donated. Recipients of donated ad space include hundreds of non-profits such as Spurwink, the United Way, Riverton and Kennedy Study Centers, the Red Cross, the Salvation Army, the Portland Museum of Art and Portland Reads. The Portland Press Herald has extended additional space when requested by Riverton and Kennedy Study Centers, the Red Cross (when emergency blood supply issues arise) sports teams such as the Red Claws and Portland Pirates (when ticket sales are soft).

This is the context of the six mayoral campaign advertisements run between October 25 and November 10, 2010, at the request of the Portland Chamber. Copies are attached. However, it is not accurate to say that ads for the Chamber were donated. Rather, in the particular case of the Chamber, in exchange for running ads for the Chamber at any time, including those attached, MTM received a substantial discount from the \$25,000 MTM paid to the Chamber in prior years to be afforded "major sponsor" status. The ads for the Chamber, including the ones in question, therefore, were an exchange of value for value, not a donation.

2. What was the total value of the advertising space? Did MTM charge the Chamber for the space?

RESPONSE:

MTM did not charge the Chamber for any ad space in 2010 in a manner typical of a commercial purchase of ad space. Rather, the ads in question were part of an arrangement with the Chamber whereby ad space was exchanged for a substantial discount on the amount that MTM pays for "major sponsor" status. The ad space had no market value as there is no market in any event for donated ad space to non-profits, much less for exchanges of value for value. No

paying customers for ad space were turned away to be able to run the Chamber's ads. Thus, there was no quantifiable opportunity lost to the paper. Even for paid commercial ads, the price varies with frequency, contractual terms, business sector, the section of the paper where the ad is run, and other variables, but under the circumstances of the arrangement with the Chamber, the commercial cost of similar space is not relevant. Further, the actual out-of-pocket cost to the paper of printing the copy for all the Chamber mayoral ads is below \$5,000.

3. Were there any direct communications between MTM and the Elect our Mayor political action committee (PAC) concerning the advertising space or the advertisements?

RESPONSE:

MTM did not communicate directly with the Elect our Mayor Committee concerning either the ad space or the content of the advertisements. In order to run the letters, guest editorials, and to report on the campaign, the paper, of course, had direct communications with Elect our Mayor, as well as the opposing group, Cheryl Leeman, a City Councilor who opposed the elected mayor, and others including letter writers, some of whom were proponents and some of whom were opponents of the initiative.

4. In the view of MTM, was it donating the advertising space to the Chamber, or to the Elect our Mayor PAC?

RESPONSE:

The ad space was supplied to the Chamber, without regard to the subject matter or content of the ads. It is not accurate to call the running of these ads a "donation" under the circumstances, as the space was an exchange of value for value.

5. Which organization(s) decided on the content of the advertisements?

RESPONSE:

The Chamber decided on the content, layout and other features and political position of the advertisements. MTM neither reviewed it for layout, content, language, or for any other factor.

6. Did MTM publish an editorial in support of the referendum?

RESPONSE:

MTM published its own editorial position in support of the referendum. MTM also published numerous letters and guest editorials in opposition. It also ran numerous news articles on the subject, quoting proponents and opponents alike.

7. Did the MTM manager(s) who authorized the donation of the advertising space know that the Chamber would use the space to promote the referendum?

RESPONSE:

The MTM manager did know that the Chamber wanted additional ad space to take a position on the referendum, and that the Chamber supported an elected mayor. The content, layout and language of the ads was unknown until it was provided in time to run the ads. However, the Chamber's position was irrelevant. Ad space was supplied to the Chamber for whatever purposes it desired, and the position of the Chamber did not affect whether the ads were run. The paper would have allowed the additional ad space and run the ads even if the Chamber opposed MTM's general editorial position, or had requested the space for a membership drive or some other purpose.

8. Is it fair to say that the purpose of MTM in providing the advertising space to the Chamber was to promote the referendum?

RESPONSE:

No. The purpose of running the ads was to further the arrangement with the Chamber. Further, the paper's purpose with respect to such ads is not to further the paper's editorial positions or agenda, but to permit non-profits the opportunity to have a voice, including the expression of their political opinions if they choose to do so. Even where donated ad space is concerned, MTM permits non-profits to express the views of their own organizations in the ad. The purpose of these donations is to increase public awareness and debate and to support activities of various non-profits because of their valuable contribution to society.

9. Was the advertising space provided by MTM part of MTM's "regular" in kind advertising agreement with the Chamber, or separate from that agreement. The Commission staff does not want to intrude on the private arrangements of the two organizations, but please provide a general explanation so that we understand the context and purpose of the donated advertisements.

RESPONSE:

The advertising space at issue for the Chamber was part of the "regular" advertising space supplied not just to the Chamber, but to a broad spectrum of non-profits, although in the case of the Chamber, MTM received a substantial discount of the "major sponsor" fees, whereas with many non-profits, there is a straight donation. Typically, the Press Herald publishes at least one ad per week for the Chamber. Non-profits including but not limited to the Chamber are routinely permitted to exceed their anticipated volumes of advertising at their request. As noted above, MTM routinely provides ad space for a broad spectrum of non-profit organizations, which are free to express political views, advertise their services, or solicit donations at their discretion. Non-profits often request additional space, and it is usually given. In addition, other

non-profits often request and receive ad space under a wide variety of circumstances on an ad hoc basis, even when they are not pre-arranged recipients of ad space.

Richard Connor

Publisher

Ionathan S. Piper, Esq.

Counsel to MaineToday Media



Portland is governed by a nine member, part-time City Council that is frequently divided, and stagnates. As a result, good opportunities pass us by.

A full-time Mayor will provide stistained leadership to bring new jobs and new efficiencies to Portland.

- forever cover the mayor's salary with enough left over to lower taxes or retain needed services.
- Erof \$1 per person, or .0003 of the City Budget, a full-time Mayor is an investment strongly supported by local businesses and neighborhood groups.

Question 1 on Portland's local ballot would create a REAL Mayor, directly elected by Portland voters, for a 4-year term.

This is the leadership Portland needs.

The Portland Community Chamber and the League of Young Voters
urse you to vote YES on 1 urge you to vote YES on 1







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A full-time Mayor will provide stistained leadership to bring new jobs and new efficiencies to Portland.

- If from Mayor can leverage just one moderate sized development, the new tax base will forever cover the mayor's salary with enough left over to lower taxes or retain needed services.
- Services

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Elected Mayor



In 1923, Portland voters lost the right to directly elect their mayor.

Right now, only 9 members of our City Council can choose our Mayor, and some insiders want to keep it that way — and they are misrepresenting the facts.

Here are the FACTS about Question 1:

- Question 1 gives our Mayor a 4-year term so that initiatives can be started and completed! One year is simply not enough.
- Question 1 gives the people the right to elect our Mayor, ensuring that citizens will have a direct say in Portland's direction. When is the last time you could note on Portland's future?
- Question 1 would give our Mayor important new authorities, including the right to present a City budget, veto the City budget, appoint committees, oversee the hiring and performance of the City Manager, serve as Portland's official anthossador, and guide the implementation of city policy by the City Manager. Our current mayor has only one power chairing Council meetings.
- Question 1 gives our Mayor more authority than nearly every other of the 1,000 American cities with a similar form of government including Austin, TX, Savannah GA, Long Beach, CA, Kansas City, \$40, Naples, FI, San Antonio, TX, Eugene, OR, and many more!

Flect our Mayor, YES on 11 is a broad coslition of citizens across Portland, including former mayors, school board chairs, current and former state legislators, neighborhood leaders, the Portland Community Chamber, and the League of Young Voters.

On November 2nd, please join us in SUPPORTING Question 1 on Portland's local ballot!

Justin Attonid Eric Atthotic John Anton James Beinks, Sr. Jill Barkley Richard Bellatiore Michael Bourque Mike Cardente Wendty Cherutan Ben Calpina Jirda Cohen James Cohen James Cohen James Cohen James Cohen Kinberly Cook
Harold Crabill
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Genn Curuning
Hauric Davis
Kevin Donoghue
Kevin Donoghue
Kelly Dudour
Peter Dufour
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ScottDutton
Peter Epinton
Will Eyeritt
Kas Frenkel
Jan Gale

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Jim Geoch
Andy Graham
Katle Gray
Chip Harris
Jed Harris
Nelson Harris
Quincy Hentzel
Tim Honey
Bon Hornblower
Any Hornblower
Jack Harmenfulk
Matt Jacobson

Tom Keith
Tom Laudry
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Christian Molan
Jadine O'Brien
Robert O'Brien
Chris O'Neil
Bob Pincate

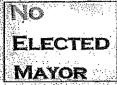
Michael Pizze
Pamela Plumb
Pamela Plumb
Annie Pringle
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Peter Rickett
Rick Romano
Steven Scharf
Lason Scharf
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John Spitiz
Tim St. Hitaire
Paul Steviens
Ethan Strimling
Jessica Jordinson
Arina Revervow
David Very
Lisa Very
Tom Ward
Jane Wellehan
Jason-Wheeler
Töbery Williamson
Jack Whoods
And Jack Whoods
And Jack Whoods

www.electourmayorportland.com

REAL MAYOR
Your Choice
Vote YES on 11

Some City Hall Insiders Would Prefer You Didn't Vote for YOUR Mayor.





NO Right to Vote NO Accountability NO Leadership

Question 1 is about allowing US to elect our Mayor, not 9 members of our City Council. It is about OUR right to vote, and OUR right to set a direction for Portland.

MYTH vs. REALITY

Insider Myth 1: "We can't afford a Mayor."

Don't be fooled! They are using wildly inflated numbers and conveniently forget that our part-time Mayor ALREADY draws a salary, full benefits, and has access to staff. By contrast, Question 1 gives us a full-time Mayor whose costs are more than offset by the benefits.

Insider Myth 2: "Our new Mayor will have no new authority."

Not true! Question I would give our new Mayor substantial new powers over the City budget, overseeing the City Manager, representing Portland to other governments, and running the City Council. Our current Mayor has one power: chairing City Council meetings.

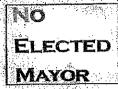
Local businesses and residents understand why we NEED an elected Mayor.

Portland is a great city with limes, we have had to face difficult cuts and ever higher taxes. ected Mayor with the tenure to ion for our future and the eadership **to eet** thines done

term and constant presence in City Hall. official corresulty has. For the first time, t would be sue person, accountable to the voters, who could speak for the city. We unge Ponland residents to vote "res" on



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So they distort the facts.

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Fortland is a great city with wonderful scipols. But in tough times, we have had to face difficult cuts and ever higher traces. Ouestion, I would give Portland an elected Mayor with the tenter to plan for our future and the leadership to get things done. Ouestion I is the rigid answer for pur city and our school course to pur city and our school.

Peter Eglinton, Rosemont

That mandate from the people, length of term and constant presence in City Hall would give the mayor stature that no city official currently has. For the first time, there would be one person, accountable to the roters, who could speak for the city.

We may Portland residents to your 'ves' on Charlest.

- The Purtland Press Herald (10/16)

as small utaness women making as investment in our community, are want to see an elected Mayor who is accountable to voters for every direct the city pends. Our current system gives for too mackgrespossibility to people who have no accountability to voters. That's not representative government. Please yote Yes on!!

Katie & Jenny Capron,
 Katie Made Bakery, East Bayside.

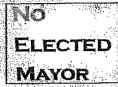
www.electourmayorportland.com



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Your Choice
Vote YES on 11

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Local businesses and residents understand why we NEED an elected Mayor.

Portland is a great city with wonderful schools. But in tough times, we have had to face difficult cits and ever higher taxes. Question I would give Portland an elected Mayor with the tenure to plan for our future and the Teadership to get things done. Question I is the right answer for our city and our schools.

That mandate from the people, length of team and constant presence in City Hall would give the major stature that no city official currently has. For the first time, there would be one person, accountable to the voters, who could speak for the city. We must Portland residents to vote "yes" on Constant.

The Portland Press Herald (10/18)

As small business women making an investment in our community, see want to see as dected Mayor who is accountable to voters for every dinner the City seends. Our current system gives tool much responsibility to people who have no accountability to voters. That's not representative government. Please you're yes ont!

- Katle & Jenny Capron. Katle Made Bakery, East Bayside

www.electourmayorportland.com



REAL MAYOR
Your Choice
Vote YES on 1!

Paid for and authorised by Elect our Mayor, YES on 11 Kimberly Cook Treasurer.



February 2, 2011

Jonathan Wayne, Executive Director Commission on Governmental Ethics and Election Practices 135 State House Station Augusta, ME 04333

Via Email RE: Valleau Complaint

Dear Mr. Wayne;

I am responding to the questions you asked in your letter of January 21, 2011 in regard to the Valleau complaint, Please note that I have copied your questions and my responses follow each question.

1. Please describe in general terms how the Portland Press Herald came to donate free advertising space to the Chamber in connection with the referendum.

RESPONSE: The Portland Newspaper is a major sponsor of the Chamber and in this context provides free ads to the Chamber to use for our own purposes. I am told that a volunteer board member of the Portland Community Chamber approached Richard Connor at an event in Portland and asked if they could discuss support for the elected mayor campaign, perhaps including ad space. (The volunteer did not yet know that the Portland Regional Chamber had already used one of our free ads to support the Elect Our Mayor Campaign). Richard Connor told her he would introduce her to his advertising director who was also at the event. Apparently unable to locate that individual, Mr. Connor told her the chamber already had and would have advertising space available for it to use on an ongoing basis. Several days later, an employee of Maine Today Media contacted me offering to give the Chamber additional ads.

2. Which organization(s) had control over the content of the advertisements?

<u>RESPONSE:</u> The Chamber had input over the content, and the Elect Our Mayor, Yes on 1 PAC had direct and final control over the ad contents. To my knowledge, the Portland Press Herald exercised no control over the content.

3. Based on facts known to the Chamber, is it fair to say that the Press Herald's purpose in providing the advertisements was to support the referendum'? (Please expand, if necessary.)

RESPONSE: I have no additional insights into the newspaper's purposes behind offering this space to us...

4. Please identify the people at the Chamber who communicated with the Press Herald concerning the advertisements, and a general idea of the topics of communication.

Falmouth/Cumberland • Portland • Scarborough • South Portland/Cape Elizabeth • Westbrook 60 Pearl Street, Portland, Maine 04101-4163
207.772.2811 Fax: 207.772.1179 • portlandregion.com

RESPONSE: In addition to me, Laura LeBrun, the Chamber's manager of communications, also communicated with the newspaper. We talked only about the number of ads offered and their deadlines.

5. Was the Press Herald's donation of advertising space part of the newspaper's "regular" in-kind agreement with the Chamber, or separate from that agreement? The Commission staff does not wish to intrude on the private relationship between the two organizations, but please provide a general response that allows the Commission to understand the facts of the situation.

<u>RESPONSE:</u> The newspaper's donation of space was part of our ongoing business relationship of in kind donations with additional space being made available.

6. Please describe the relationship between the Chamber and the Elect Our Mayor political action committee (PAC). For example, were officers or managers of the Chamber heavily involved in the PAC or on the steering committee of the PAC?

<u>RESPONSE:</u> The Portland Community Chamber has long advocated for an elected mayor, and was happy to be able to support the Elect Our Mayor PAC through the providing of ad space contributed to the Portland Regional Chamber, Chris O'Neil, a paid consultant to the Portland Community Chamber was involved with the steering committee of the elected mayor PAC as was Jim Cohen, Vice- Chair of the Portland Regional Chamber.

7. To the best of the Chamber's knowledge, was there any communication directly between the Elect our Mayor PAC and the Press Herald concerning the advertising space or the advertisements?

RESPONSE: I am not aware of any direct communication between the PAC and the newspaper.

8. The Chamber has a PAC, which you may view as part of the Chamber or as a separate entity for accounting purposes. In either case, my general understanding is that the Chamber made financial contributions to the Elect our Mayor PAC and may have conducted other activities to support the referendum. Those activities, however, were not reported by the Chamber's PAC. Why? At this point, would it be appropriate for those financial activities to be reported by the PAC? (This question bears on whether the Press Herald was required to register and file reports.)

RESPONSE: There are two separate PACs. One is the PAC of Portland Regional Chamber and the other is the PAC of the Portland Community Chamber. Neither Chamber PAC contributed to the campaign. Both chambers chose to directly participate by making in-kind contributions to the Elect Our Mayor, Yes on 1 PAC. The Portland Community Chamber contributed cash, and some consultant's time, and the Portland Regional Chamber contributed ad space and several hours of staff time. It is the contribution of the Portland Regional Chamber of its full page ads and staff time that you have questions about, and that contribution was made directly from the chamber resources to the Elect Our Mayor, Yes on 1 PAC. To my knowledge, neither of the chambers' PACs engaged in any political activity in the campaign. There were no other activities.

Please feel free to call or write with any questions.

Sincerely,

Godfrey Wood, CEO

Contributions to PACs and BQCs (13 Days before an Election)

25,000.00	StandForMarriageMaine.com	10/29/2009 Fieldstead & Company
40,000.00	StandForMarriageMaine.com	10/29/2009 National Organization for Marriage
160,000.00	StandForMarriageMaine.com	10/27/2009 National Organization for Marriage
40,000.00	StandForMarriageMaine.com	10/26/2009 National Organization for Marriage
100,000.00	StandForMarriageMaine.com	10/23/2009 National Organization for Marriage
35,000.00	No on 1 Protect Maine Equality	10/23/2009 Fred Eychaner
25,000.00	Citizens Unified for Maine's Future	11/3/2009 DRIVE Committee
100,000.00	Citizens Unified for Maine's Future	10/29/2009 Union
. 7		Service Employees International
100,000.00	Citizens Unified for Maine's Future	10/22/2009 Union
		Service Employees International
28,505.70	Center on Budget & Policy Priorities	10/21/2009 General Treasury Transfer
55,750.00	Maine Taxpayers Taking Charge	10/25/2010 Gary Bahre
55,750.00	Maine Taxpayers Taking Charge	10/25/2010 Robert Bahre
30,775.00	Maine Taxpayers Taking Charge	10/25/2010 James Boldebrook
33,700.00	Maine Taxpayers Taking Charge	10/25/2010 Robert Lally Jr.
28,000.00	Maine Taxpayers Taking Charge	10/20/2010 Rupert Grover Jr.
28,000.00	Maine Taxpayers Taking Charge	10/20/2010 Suzanne Grover
28,000.00	Maine Taxpayers Taking Charge	10/20/2010 Stephen Barber
28,000.00	Maine Taxpayers Taking Charge	10/20/2010 Mary Barber
56,000.00	Maine Taxpayers Taking Charge	10/20/2010 Robert Lally Jr.
56,000.00	Maine Taxpayers Taking Charge	10/20/2010 James Boldebrook
80,000.00	Maine Taxpayers Taking Charge	10/20/2010 Gary Bahre
80,000.00	Maine Taxpayers Taking Charge	10/20/2010 Robert Bahre
25,000.00	Dental Care for ME	11/1/2010 University of New England
25,000.00	Dental Care for ME	10/25/2010 University of New England
130,000.00	Citizens Against the Oxford Casino	10/21/2010 Penn National Gaming
Amount	Recipient PAC	Date Contributor
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